

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CLARENCE ZACHERLE (a.k.a  
CLARENCE RANDALL  
ZACHERLE, a.k.a. RANDY  
ZACHERLE),

Plaintiff,

vs.

SPOKANE COUNTY JAIL,  
SPOKANE COUNTY SHERIFF and  
DR. CHRIS KENNEDY,

Defendants.

NO: 13-CV-5122-JPH

ORDER ADOPTING REPORT AND  
RECOMMENDATION AND  
DISMISSING COMPLAINT WITH  
PREJUDICE

**1915(g)**

BEFORE THE COURT is Magistrate Judge Hutton's Report and Recommendation to dismiss the Complaint for failure to state a claim upon which relief may be granted (ECF No. 11). Specifically, Magistrate Judge Hutton found that Plaintiff's allegations of deliberate indifference arising from hip and shoulder injuries sustained after he slipped in the shower at the Spokane County Jail in 2007, were time-barred. *See Wilson v. Garcia*, 471 U.S. 261 (1985); *Rose v.*

ORDER ADOPTING REPORT AND RECOMMENDATION AND  
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1 *Rinaldi*, 654 F.2d 546, 547 (9th Cir. 1981); *Joshua v. Newell*, 871 F.2d 884, 886  
2 (9th Cir. 1989).

3 Also before the Court are Plaintiff's "Objection to Report and  
4 Recommendation to Dismiss Complaint/and Request for Extension to Amend or  
5 Voluntary Dismiss Complaint under Fed. R. Civ. P. 6(e)" (ECF No. 15), and a  
6 document titled, "Amendment to State a Claim Which Relief May be Granted, Toll  
7 the Limitation Period" (ECF No. 16).

8 Plaintiff objects to the Report and Recommendation, asserting that he is  
9 proceeding *pro se* and has no access to a law library, allegedly in violation of the  
10 Sixth Amendment. He also asserts that he has been transferred among the Spokane  
11 County Jail, the Benton County Jail and the Colville Tribal Correction Facility  
12 with only temporary stays at each facility. He seeks 66 days from December 18,  
13 2013, to comply with the Order to Amend or Voluntarily Dismiss. That date  
14 expired in February 2014. For the reasons stated below, the Court finds a further  
15 extension of time in this matter is not warranted under Fed. R. Civ. P. 6(b).

16 Plaintiff is advised that there is no independent right of access to a law  
17 library or legal assistance. *See Lewis v. Casey*, 518 U.S. 343, 350-51 (1996). An  
18 inmate cannot make out a claim that he has been denied access to the court "simply  
19 by establishing that his prison's law library or legal assistance program is sub-par  
20 in some theoretical sense." *Id.* at 351. Instead, the inmate must show that the

1 denial of legal resources hindered his efforts to pursue a non-frivolous claim. *Id.* at  
2 349-50, 35.

3 In this action, Plaintiff is asserting a claim for which the statute of  
4 limitations expired in 2010. His contention in his Amendment (ECF No. 16) that  
5 he suffers permanent damage from injuries which occurred in 2007 will not toll the  
6 running of Washington's three year statute of limitations, RCW 4.16.080(2).  
7 Clearly, Plaintiff had reason to know of his injury over three years prior to filing  
8 this action in 2013. *See Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760-61  
9 (9th Cir. 1991). He did not establish a basis for equitable tolling. *See Millay v.*  
10 *Cam*, 135 Wash.2d 193, 955 P.2d 791, 797 (1998) ("The predicates for equitable  
11 tolling are bad faith, deception, or false assurances by the defendant and the  
12 exercise of diligence by the plaintiff."). Plaintiff's assertion of "neglected medical  
13 treatment" also fails to state a claim upon which relief may be granted. *See*  
14 *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (Negligence is not actionable  
15 under section 1983).

16 Therefore, because Plaintiff's claims are time-barred and no further  
17 amendment will cure the defects of his Complaint, **IT IS ORDERED** the Report  
18 and Recommendation (ECF No. 11) is **ADOPTED in its entirety** and the  
19 Complaint (ECF No. 10) is **DISMISSED with prejudice** for failure to state a  
20

1 claim upon which relief may be granted. *See Levald, Inc. v. City of Palm Desert*,  
2 998 F.2d 680, 686-87 (9th Cir. 1993). 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1).

3 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who  
4 brings three or more civil actions or appeals which are dismissed as frivolous or for  
5 failure to state a claim will be precluded from bringing any other civil action or  
6 appeal *in forma pauperis* “unless the prisoner is under imminent danger of serious  
7 physical injury.” 28 U.S.C. § 1915(g). **Plaintiff is advised to read the new**  
8 **statutory provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff's**  
9 **complaint may count as one of the three dismissals allowed by 28 U.S.C. §**  
10 **1915(g) and may adversely affect his ability to file future claims.**

11 Pursuant to 28 U.S.C. § 1915(a)(3), “[a]n appeal may not be taken *in forma*  
12 *pauperis* if the trial court certifies in writing that it is not taken in good faith.” The  
13 good faith standard is satisfied when an individual “seeks appellate review of any  
14 issue not frivolous.” *See Coppedge v. United States*, 369 U.S. 438, 445 (1962).  
15 For purposes of 28 U.S.C. § 1915, an appeal is frivolous if it lacks any arguable  
16 basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

17 **IT IS HEREBY ORDERED:**

- 18 1. The District Court Executive is directed to enter this Order, enter Judgment,  
19 forward copies to Plaintiff at his last known address, and **CLOSE** the file.


20 All pending motions are **DENIED as moot.**

1 2. The District Court Executive is further directed to forward a copy of this  
2 Order to the Office of the Attorney General of Washington, Criminal Justice  
3 Division.

4 3. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal of this  
5 Order would not be taken in good faith and would lack any arguable basis in  
6 law or fact. Accordingly, the Court hereby revokes Plaintiff's *in forma*  
7 *pauperis* status.

8 **DATED** April 8, 2014.



  
THOMAS O. RICE  
United States District Judge